

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 SUMMARY ORDER  
5

6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER  
7 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY  
8 OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY  
9 OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED  
10 CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES  
11 JUDICATA.  
12

13 At a stated term of the United States Court of Appeals for  
14 the Second Circuit, held at the Thurgood Marshall United States  
15 Courthouse, at Foley Square, in the City of New York, on the 7th  
16 day of October, two thousand and five.  
17

18 PRESENT:  
19

20 Hon. John M. Walker, Jr.,  
21 Chief Judge,  
22 Hon. Wilfred Feinberg,  
23 Hon. Chester J. Straub,  
24 Circuit Judges.  
25

26 -----X  
27

28 PETER C. TOSTO, THOMAS TELEGADES,  
29 TELLERSTOCK, Inc., INVESTOR RELATIONS, Inc.,  
30 and CONSOLIDATED ASSET MANAGEMENT, Inc.,  
31

32 Plaintiffs-Appellees,  
33

34 - v. -  
35

No. 04-1351-cv

36 JOHN ZELAYA,  
37

38 Defendant-Appellant,  
39

40 ANTHONY LEAVITT, CAPITAL INTERNATIONAL  
41 HOLDINGS, Inc., CAPITAL INTERNATIONAL  
42 SECURITIES GROUP, CIH, Inc., CAPITAL  
43 INVESTMENT HOLDINGS, SPC, Inc., DAVID  
44 GOTHARD, and ADVANCED LIGHTING SOLUTIONS,  
45 Inc.,

1  
2 Defendants.  
3

4 -----X

5  
6 **APPEARING FOR APPELLANT:** ROBERT W. CINQUE (ROBERT W. CINQUE  
7 and JAMES P. CINQUE, of counsel),  
8 Cinque & Cinque, P.C., New York,  
9 NY.

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11 **APPEARING FOR APPELLEES:** RONALD C. MINKOFF (Wendy Stryker,  
12 of counsel), Frankfurt, Kurnit,  
13 Klein & Selz, P.C., New York, NY.  
14

15 Appeal from the United States District Court for the  
16 Southern District of New York (P. Kevin Castel, Judge).  
17

18 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**  
19 **DECREED** that the judgment of the district court be and it hereby  
20 is **AFFIRMED**.

21 Defendant-appellant John Zelaya appeals from a February 25,  
22 2004, judgment of the United States District Court for the  
23 Southern District of New York (P. Kevin Castel, Judge) granting  
24 default judgment in favor of Peter C. Tosto, Thomas Telegades,  
25 Tellerstock, Inc., Investor Relations, Inc., and Consolidated  
26 Asset Management, Inc. (collectively, "plaintiffs").

27 On appeal, Zelaya argues that the district court erred when  
28 it (1) issued its July 31, 2001, order of default in favor of  
29 plaintiffs; (2) refused to set aside the default in an October 5,  
30 2001, order; and (3) adopted Magistrate Judge Kevin Nathaniel  
31 Fox's Report and Recommendation on July 28, 2003, setting  
32 damages.

33 We review an entry of default, and the denial of a motion to  
34 set aside that default, for an abuse of discretion. Enron Oil  
35 Corp. v. Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993). We assume  
36 familiarity with the facts and the procedural history.

37 This circuit has established three criteria that a court  
38 should consider in determining whether to grant relief from the  
39 entry or judgment of default for "good cause": (1) whether the  
40 default was willful; (2) whether setting aside the default would  
41 prejudice the adversary; and (3) whether a meritorious defense is  
42 presented. Pecarsky v. Galaxiworld.com, Ltd., 249 F.3d 167, 171  
43 (2d Cir. 2001).

44 Our review of the record indicates that the district court  
45 did not commit error when it denied Zelaya's motion for relief

1 from the order of default. The district court acted within its  
2 discretion when it determined that Zelaya's actions were willful  
3 - i.e., that they constituted more than mere negligence or  
4 carelessness. In any event, Zelaya has failed to establish a  
5 meritorious defense to plaintiffs' fraudulent-inducement claim.

6 Because Zeyala failed to file an objection to Magistrate  
7 Judge Fox's May 12, 2003, Report and Recommendation regarding  
8 damages, he has waived his right to appeal the district court's  
9 July 28, 2003, order adopting those recommendations. SEC v.  
10 McNulty, 137 F.3d 732, 737 (2d Cir. 1998); Wesolek v. Canadair  
11 Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988).

12 We have considered Zelaya's other arguments and find them to  
13 be without merit.

14 Accordingly, and for the foregoing reasons, the judgment of  
15 the district court is hereby **AFFIRMED**.

16  
17 FOR THE COURT:

18 Roseann B. MacKechnie, Clerk

19  
20 By:\_\_\_\_\_

21 Richard Alcantara, Deputy Clerk